Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1995

JOSEPH GROSZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this case, the district court took a routine pretrial motion "under advisement" for approximately one year. On the day of the court's ruling on this motion, the court had a one-minute colloquy with the prosecutor before ruling against the government. The court of appeals held that this one-minute colloquy was a "hearing" for purposes of excluding the one-year delay under the Speedy Trial Act, and that the thirty-day limitation on "under advisement" consideration in the Speedy Trial Act did not apply.

1. What is a "hearing" under the Speedy Trial Act for purposes of calculating excludable time for pretrial motions?
2. Whether the court of appeals erred in making a *de novo* determination that a "hearing" occurred, where the district court made no such finding?
3. Whether the court of appeals erroneously concluded that a "hearing" on a pretrial motion occurred under the Speedy Trial Act when (i) neither party requested a hearing; (ii) the district court did not notice a hearing; (iii) the district court had specifically stated it was taking the matter "under advisement" on the papers; and (iv) the one-minute colloquy between the court and the government prior to the court's ruling merely gave the government the opportunity to restate its position?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner Joseph Grosz and the United States of America.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

LEGAL PROVISIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

A. THE OPINION BELOW WILL HAVE SERIOUS ADVERSE CONSEQUENCES FOR THE ADMINISTRATION OF THE FEDERAL CRIMINAL JUSTICE SYSTEM AND THE SPEEDY TRIAL ACT 8

B. THE OPINION BELOW IS INCONSISTENT WITH THE LANGUAGE AND STRUCTURE OF, AND LEGISLATIVE INTENT BEHIND, THE SPEEDY TRIAL ACT 16

C. THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR DECISIONS CONSTRUING THE SPEEDY TRIAL ACT 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Arizona v. Roberson, 486 U.S. 675 (1988) 20

Bailey v. United States, 116 S. Ct. 501 (1995) 17

Barker v. Wingo, 407 U.S. 514 (1972) 18

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 15

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 13, 15

Gasperini v. Center for Humanities, Inc., 64 U.S.L.W. 4607 (U.S. June 24, 1996) (No. 95-719) 13, 14

Henderson v. United States, 476 U.S. 321 (1986) ..... *passim*

Ingraham v. Wright, 430 U.S. 651 (1977) 15

Koon v. United States, 64 U.S.L.W. 4512 (U.S. June 13, 1996)(Nos. 94-1664, 94-8842) 13, 14

Mathews v. Eldridge, 424 U.S. 319 (1976) 15

Ornelas v. United States, 116 S. Ct. 1657 (1996) 13, 14

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 17

Salve Regina College v. Russell, 499 U.S. 225 (1991) 14

United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) 20

United States v. Briscoe, 839 F. Supp. 31 (D.D.C. 1993) 10

United States v. Campbell, 706 F.2d 1138 (11th Cir. 1983) 18

United States v. Clymer, 25 F.3d 824 (9th Cir. 1994) 10

United States v. Detroit Timber & Lumber Co., 200 U.S. 321 (1906) 4

United States v. Florida E. Coast Ry. Co., 410 U.S. 224 (1973) 12

CASES **PAGE(S)**

United States v. Gambino, 59 F.3d 353 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1671 (1996) 10

United States v. Grosz, 977 F.2d 577 (5th Cir. 1992), *cert. denied*, 507 U.S. 921 (1993) 4

United States v. Hayman, 342 U.S. 205 (1952) 15

United States v. Henderson, 746 F.2d 619 (9th Cir. 1984), *aff'd*, 476 U.S. 321 (1986) 20

United States v. Jones, 23 F.3d 1307 (8th Cir. 1994) 16

United States v. Jones, 56 F.3d 581 (5th Cir. 1995) 9

United States v. Lewis, 980 F.2d 555 (9th Cir. 1992) 19

United States v. Mobile Materials, Inc., 871 F.2d 902 (10th Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990) 18

United States v. Palomba, 31 F.3d 1456 (9th Cir. 1994) 18

United States v. Riley, 991 F.2d 120 (4th Cir.), *cert. denied*, 114 S. Ct. 392 (1993) 10

United States v. Springer, 51 F.3d 861 (9th Cir. 1995) 8, 18

United States v. Staula, 80 F.3d 596 (1st Cir. 1996), *petition for cert. filed*, No. 95-9440 (June 26, 1996) 9, 12

United States v. Tannehill, 49 F.3d 1049 (5th Cir.), *cert. denied*, 116 S. Ct. 167 (1995) 7, 9

United States v. Taylor, 487 U.S. 326 (1988) 19, 21

United States v. Wimberly, 60 F.3d 281 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 744 (1996) 19

CONSTITUTION AND STATUTES

U.S. CONST. amend. VI 2

18 U.S.C. § 3161 (1994) ..... *passim*

18 U.S.C. § 3231 (1994) 1

28 U.S.C. § 1254(1) (1994) 1

PAGE(S)

OTHER AUTHORITIES

BENJAMIN J. CARDOZO, THE GROWTH OF THE LAW 3 (1924) 18

Henry J. Friendly, "*Some Kind of Hearing*", 123 U. PA. L. REV. 1267 (1975) 15

H.R. Rep. No. 1508, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7426 17

S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979) 11, 17

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph Grosz respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on February 22, 1996.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 76 F.3d 1318 (5th Cir. 1996). The order of the court of appeals denying the petition for rehearing (Pet. App. 25) is unpublished. *See* 84 F.3d 435 (5th Cir. 1996). The opinion of the district court (Pet. App. 21) is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 22, 1996. A petition for rehearing was filed on March 13, 1996, and denied on April 9, 1996. Original jurisdiction before the district court was appropriate under 18 U.S.C. § 3231 (1994). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. amend. VI

18 U.S.C. § 3161 (1994)

These provisions are set forth at pages App. 27-35 of the Petitioner's Appendix.

STATEMENT OF THE CASE

Petitioner Joseph Grosz is a former loan officer for a savings and loan bank located in Houston, Texas. In December 1991, he was indicted in the Northern District of Texas, Dallas Division, in a case alleging bank fraud. Trial in the case commenced on March 7, 1994, more than two years later. A jury convicted Petitioner of four of the twelve counts against him. He was acquitted of the remaining counts. On September 30, 1994, Petitioner was sentenced to five years imprisonment. He is currently incarcerated in a federal corrections facility.

On January 27, 1992, shortly after his indictment, Petitioner filed several pretrial motions. One motion in limine sought to exclude from the trial evidence of the financial condition of the financial institutions referenced in the indictment. Such motions are routinely filed by the defense in bank fraud cases. The record is undisputed that Petitioner's two and one-half page motion was straightforward and raised no novel legal issues. *See* Pet. App. 46-48.

On February 3, 1992, the government filed a standard opposition to the motion in limine. Pet. App. 49. With leave of the district court, Petitioner responded to the opposition on February 25, 1992. Pet. App. 52. Neither party at any time requested a hearing on the motion in limine, and the district court did not set the matter down for a hearing.

Instead, on May 7, 1992, the district court expressly informed the parties at a pretrial conference that it was taking the motion in limine "under advisement." Pet. App. 54. A few moments later, the district court clarified this by informing the parties that "the court will be prepared to rule on [the motion in limine] at the next pretrial conference." Pet. App. 55. On May 13, 1992, the district court reiterated in a written pretrial order that it had taken the motion in limine "under advisement." Pet. App. 58.

On May 7, 1992, the district court denied Petitioner's motion to dismiss the indictment on double jeopardy grounds.[1] The period from May 15, 1992, to March 4, 1993, was taken up with an interlocutory appeal of that ruling.[2]

One year later, on March 3, 1994, the district court held what it earlier had characterized as a "pretrial conference." *See* Pet. App. 59, 60.[3] At this conference, the following colloquy between the district court and prosecutor occurred:

> THE COURT: 91-390, United States versus Grosz. It appears we have two motions currently pending. One of them is the defendant's motion in limine to exclude evidence of subsequent financial conditions, and then defendant's motion to dismiss the indictment based on preindictment delay.
>
> All right. Does the government oppose the defendant's motion in limine?
>
> [THE PROSECUTOR]: Yes, Sir.
>
> THE COURT: On what basis?
>
> [THE PROSECUTOR]: We believe that the evidence of loss occasioned by the transactions in which this defendant participated in shows evidence of intent and also a pattern of dealings with these

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[1] Petitioner previously had been acquitted in a bank fraud prosecution in the district of Kansas.

[2] The Fifth Circuit affirmed the denial of the double jeopardy motion on October 8, 1992 in an unpublished opinion. *See United States v. Grosz*, 977 F.2d 577 (5th Cir. 1992). This Court denied certiorari on February 22, 1993. *Grosz v. United States*, 507 U.S. 921 (1993). The case was placed back on the regular trial calendar on or about March 4, 1993.

[3] The captions on transcripts of proceedings before the district court read "Pretrial Hearing." *See* Pet. App. 54, 60. This appellation was applied by the court reporter, subsequent to the proceedings, and is irrelevant to the issues before this Court. *Cf. United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906) (headnote not part of the opinion of the court).

institutions. And the jury should be able to consider this evidence to fully appreciate the extent of the defendant's conduct in this particular series of transactions which resulted in substantial losses for two different financial institutions.

THE COURT: Would your [argument] be the same if the properties had sold at a profit?

[THE PROSECUTOR]: I believe the jury should be entitled to understand exactly what did happen to the properties as to whether they were profitable or sold at a loss.

It's important to know how this defendant's activities and arrangements for these loans and approving these loans played into the overall financial structure of the institutions and what ultimately happened to these entities.

THE COURT: I'm going to grant the motion in limine. The government shall not refer to any losses on the properties in the presence of the jury without first approaching the court and obtaining a ruling from the court if you intend to offer such evidence.

All right. Defendant's motion to dismiss the indictment.

Is this motion going to require a hearing?

[DEFENSE COUNSEL]: Good morning, Your Honor, Elliott Samuels on behalf of Mr. Grosz.

Defense counsel was not asked to speak to the motion in limine. No notice or other indication was provided that a hearing on the motion in limine would be held. *See* Pet. App. 59, 60-61.

On the morning of the referenced colloquy, March 3, 1994, Petitioner filed a motion in the district court to dismiss the indictment ("the motion to dismiss") on the ground that a

violation of the Speedy Trial Act ("the Act") had occurred. Pet. App. 36. The motion to dismiss explained that the decision of the district court to take the motion in limine "under advisement" triggered operation of 18 U.S.C. § 3161(h)(1)(J) of the Act ("Subsection (J)"). Pet. App. 38-42. Since the motion in limine had previously been taken under advisement by the district court pursuant to Subsection (J), Petitioner argued, only thirty days of excludable time was permitted. Consequently, Petitioner calculated that "about one year" of non-excludable time had elapsed from his arraignment, which exceeded the Speedy Trial Act's seventy-day limitation. Pet. App. 38.[4]

In response, the government did not discuss the application of Subsection (J). Instead, the government argued that "[t]he law of the Fifth Circuit is clear that under § 3161(h)(1)(F)" any delay resulting from pretrial motions tolls the speedy trial clock. Pet. App. 43. The government argued further that the motion to dismiss should be denied because there was "no indication that [Petitioner] has made any effort . . . to complain of the Court's delay in deciding his pretrial motions." Pet. App. 44. Even though its response was filed on the day following its colloquy with the district court, the government did not argue that a "hearing" had been held on the motion in limine, or otherwise challenge Petitioner's view that Subsection (J) applied.

The district court denied Petitioner's motion to dismiss. Pet. App. 21. The district court noted that it had taken the motion in limine "under advisement." Pet. App. 22. Nevertheless, the district court held, erroneously as a matter of law, that *any* pending pretrial motion automatically tolls "in-

[4] The court of appeals calculated that 354 days elapsed between the final resolution of Petitioner's interlocutory appeal and the filing of an additional pretrial motion that tolled the running of the speedy trial clock shortly prior to trial. Pet. App. 1. This calculation is undisputed on this record.

definitely" the running of the speedy trial clock. Pet. App. 23. The government did not seek reconsideration or clarification of the ruling.

Upon conviction, Petitioner appealed the district court's denial of the motion to dismiss. A panel of the Fifth Circuit, after acknowledging that the district court's rationale concerning indefinite tolling was "plainly incorrect" as a matter of law, Pet. App. 8 n.6, nevertheless affirmed. Pet. App. 11. Without proper regard for the district court's earlier express statements to the parties that it had taken the motion in limine "under advisement," and that it would be prepared to rule at the next pretrial conference, the panel instead opted to hold as a matter of law that the limited exchange between the prosecutor and the district court constituted a hearing for purposes of 18 U.S.C. § 3161(h)(1)(F) ("Subsection (F)") of the Act. The panel concluded that *Henderson v. United States*, 476 U.S. 321, 331 (1986), which held that all time elapsed between the filing of a pretrial motion and a hearing held on the motion is excludable under Subsection (F), thus compelled the result that the one-year delay in question was excludable. Pet. App. 11.

The panel acknowledged that the Act does not define what constitutes a "hearing," and that in a recent case it had observed that there appeared to be no "authorities addressing the issue." Pet. App. 8 (citing *United States v. Tannehill*, 49 F.3d 1049, 1053 (5th Cir.), *cert. denied*, 116 S. Ct. 167 (1995)). Despite this, observing that "the Supreme Court emphasized [in *Henderson*] that '[t]he provisions of the Act are designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion,'" the panel concluded that "[t]his purpose identified by the Supreme Court suggests that a relatively broad definition of 'hearing' is appropriate." Pet. App. 9. The panel discounted the district court's several pronouncements that it had taken the pretrial motion "under advisement," stating that *de novo* review was appropriate for "legal conclusions." Pet. App. 5. Without

further citation of authority, the panel then held that the term "hearing" under Subsection (F) "includes a situation in which the district court hears argument of counsel and considers it prior to making its ruling." Pet. App. 9.[5]

The Fifth Circuit denied Petitioner's petition for rehearing on April 9, 1996. Pet. App. 25.

REASONS FOR GRANTING THE PETITION

A. THE OPINION BELOW WILL HAVE SERIOUS ADVERSE CONSEQUENCES FOR THE ADMINISTRATION OF THE FEDERAL CRIMINAL JUSTICE SYSTEM AND THE SPEEDY TRIAL ACT.

The opinion of the court of appeals in this case may well affect hundreds if not thousands of cases in the federal courts and severely undercut the purpose of the Speedy Trial Act. Moreover, the panel's ruling will adversely affect the efficient administration of the federal courts by discouraging district courts from ruling promptly on pretrial motions. Instead, the panel's holding will encourage delay -- by permitting district courts to evade the operation of Subsection (J) by postponing rulings on pretrial motions until the eve of trial and then asking a party to comment immediately before ruling. The operation of the Act, specifically the reach of Subsection (F), is "an already complicated area of the law." *United States v. Springer*, 51 F.3d 861, 865 (9th Cir. 1995). The uncertainty bred by the panel's opinion should not be permitted to fester

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[5] The panel did not explain why this should always be the case as a matter of law, especially in a case such as this one where neither party sought a hearing and a hearing was not scheduled by the district court. *See* Pet. App. 10. Nor did the panel articulate how the 354-day delay "between the final disposition of [Petitioner's] interlocutory appeal and the filing of his motion to dismiss," Pet. App. 5, placed the district court in a better position to rule on the motion in limine.

in this important area affecting the administration of speedy justice in our federal district courts.

1. If the panel opinion is allowed to stand, the right to a speedy trial under the Act will be severely compromised, if not effectively cease to exist, in cases where pretrial motions are filed. According to *Henderson v. United States*, 476 U.S. 321, 330 (1986), all time between the filing of pretrial motions and hearings held on the motions is excludable. The panel's analysis will permit district courts to "cure" violations of the thirty-day "under advisement" provision of Subsection (J) by simply asking a party to restate its position immediately before ruling. In the wake of the instant case, one court of appeals has ruled expansively that "a hearing is any on-the-record colloquy in which the district court hears the arguments of counsel and considers those arguments prior to deciding a pending motion." *United States v. Staula*, 80 F.3d 596, 602 (1st Cir. 1996), *petition for cert. filed*, No. 95-9440 (June 26, 1996); *see also Tannehill*, 49 F.3d at 1052-54. The panel in the instant case asserted that no notice that a "hearing" is contemplated need be provided. Indeed, as in the instant case, the district court earlier can have indicated to the parties that the matter was taken "under advisement." Such an escape hatch from the rigors of Subsection (J) completely undercuts the purposes of the Act.

Moreover, the panel's opinion permits such a "cure" to take effect at either the district court or appellate court level, regardless of the facts in the record. This approach is inconsistent with the proposition that retroactive recharacterizations of what occurred before the district court are not favored under the Act. *See, e.g., United States v. Jones*, 56 F.3d 581, 584 (5th Cir. 1995).

2. By authorizing a retroactive "cure" to remedy a violation of Subsection (J) through a short colloquy with a party on the eve of trial, on a motion previously taken under advisement, the panel opinion conflicts with approaches taken

by the Ninth and Second Circuits in comparable circumstances. In *United States v. Gambino*, 59 F.3d 353 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1671 (1996), and *United States v. Clymer*, 25 F.3d 824 (9th Cir. 1994), the courts of appeals held that district courts cannot postpone hearings on pretrial motions until after trial, and still exclude under Subsection (F) all the time between the filing and the hearing. *Gambino*, 59 F.3d at 359; *Clymer*, 25 F.3d at 830.[6] In reaching this result, the courts stressed that the need to prevent manipulation of the Act compelled the holding that once a hearing is postponed until after trial, Subsection (F) no longer applies. *Gambino*, 59 F.3d at 359; *Clymer*, 25 F.3d at 829-30. The Second Circuit reasoned that if it were not to adopt this prophylactic rule, district courts would routinely postpone hearings, *sua sponte* or at the government's request, and thereby use Subsection (F) as a means to evade the Act. *Gambino*, 59 F.3d at 359.[7]

Any other approach, according to the Ninth Circuit, would render Subsection (J) "a nullity." *Clymer*, 25 F.3d at 830. By the expedience of scheduling a hearing to follow the trial and thereby excluding otherwise unjustifiable delay, the thirty-day provision of Subsection (J) would never apply. If the practice of allowing district courts to insulate themselves from violations of the Act were permitted, then "perpetual postponements would become routine in every case where a defendant seeks an evidentiary hearing." *Gambino*, 59 F.3d at 359. Contrary to Congressional intent, Subsection (F) would truly become the "loophole [that] could undermine the whole

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[6] Likewise, one court has held that the district court cannot exclude time taken to decide whether to hold a hearing. *United States v. Briscoe*, 839 F. Supp. 31, 34 n.4 (D.D.C. 1993) (declining invitation to "adopt such an expansive reading of *Henderson*").

[7] To the contrary, in *United States v. Riley*, 991 F.2d 120, 123-24 (4th Cir.), *cert. denied*, 114 S. Ct. 392 (1993), the court of appeals held that all time from the filing of a motion until the hearing is excluded under Subsection (F) -- even when the hearing had been postponed until trial.

Act." *See Henderson*, 476 U.S. at 328 (citing S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979)).

Such is the result permitted by the panel opinion below. If the opinion is permitted to stand, without clarification by this Court concerning whether the holding squares with *Henderson*'s interpretation of Subsection (F) and Subsection (J), the district courts will be authorized to insure against any violation of the Act by holding one pretrial motion "under advisement" until the eve of trial and then asking a party, against whom the court intends to rule, whether he or she continues to hold the position stated in the motion papers. Under the panel's analysis, in every case as a matter of law such a repartee would constitute a hearing pursuant to Subsection (F), and Subsection (J)'s limitation would become illusory.[8]

This result conflicts with *Henderson*, which foresaw that courts might be tempted to take advantage of the breadth of Subsection (F) in order to evade the Act's guarantees, but which relied on the interplay with Subsection (J) to prevent such a tactic: "The phrase 'prompt disposition' [in Subsection (F)] was intended to prevent a district court from using subsection (F) to exclude time after a motion is taken under advisement when that time fails to qualify for exclusion under subsection (J)." *Henderson*, 476 U.S. at 329. If, however, Subsection (J) can be evaded through the barest of colloquies, it no longer can act as a check on the open-ended exclusion of Subsection (F) and the foundation assumptions underlying *Henderson* disintegrate.

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[8] The Fifth Circuit confidently "acknowledge[d] that [it] would not recognize the exchange as a 'hearing' if the record demonstrated an attempt on the part of the district court or the government to manufacture a 'hearing' to avoid the operation of the Speedy Trial Act." Pet. App. 10 n.7. The panel, however, gave no guidance concerning how to recognize such a sham, and offered no record support for its determination that there was no subterfuge here.

3. *De novo* review by the court of appeals regarding whether a hearing is required and actually held on a pretrial motion will foster a byzantine body of appellate law regarding the attributes of hearing-worthy pretrial motions and what constitutes a hearing. The endless scenarios analyzed in these future appellate cases, each of which will practically stand alone on its facts, will not provide meaningful guidance or foster straightforward application of Subsection (F) and Subsection (J) by the district courts.

Under *Henderson*, the determination of whether a pretrial motion requires a hearing is critical to the calculation of excludable time under the Act. *See* 476 U.S. at 329. This Court had no occasion in *Henderson* to determine who decides whether a pretrial motion requires a hearing, or if in fact a hearing was held.[9] Permitting the courts of appeals to make the determination *de novo* as a matter of law, as authorized by the panel below and those already following in its wake, *see Staula*, 80 F.3d at 602, is inconsistent with both the efficient operation of the Act at the district court level and the practical limitations of appellate review in this context.

A district court's need for a hearing in the pretrial motion context, and its determination of the type of proceeding it requires, of necessity will vary according to the individual judge, his or her level of expertise, and the issues presented by the motion and the case to be tried. "Hearing" in this context, as referenced in Subsection (F), "undoubtedly has a host of meanings." *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 239 (1973). In the first instance it must be left to the district court, not an appellate court, to decide whether a hearing is required to assist it in ruling on a pretrial motion. The effort by the panel below to distill a general rule of law defining "hearing" after the fact has resulted in an overly

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[9] In *Henderson*, the district court had scheduled a hearing, and there was no dispute as to what had occurred factually below. *Id.* at 324 n.3. Application of Subsection (F) was not contested.

broad definition that improperly enlarges what Congress feared -- in Subsection (F) -- was a potential legislative "loophole." *Cf. Henderson*, 476 U.S. at 328.

4. Granting a writ of certiorari in this case will present an opportunity to clarify further the proper apportionment of decision-making authority between the district courts and courts of appeals, an area that this Court has deemed worthy of its attention. *See Gasperini v. Center for Humanities, Inc.*, 64 U.S.L.W. 4607 (U.S. June 24, 1996) (No. 95-719); *Koon v. United States*, 64 U.S.L.W. 4512 (U.S. June 13, 1996) (Nos. 94-1664, 94-8842); *Ornelas v. United States*, 116 S. Ct. 1657 (1996); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). Following these cases, all but one of which were unavailable to the panel below, whether a hearing has occurred for purposes of Subsection (F) should not be considered a pure question of law warranting *de novo* review by a court of appeals.

In the pretrial context, where motions and cases present endless fact patterns, what constitutes a hearing involves consideration of "unique factors that are 'little susceptible . . . of useful generalization.' " *Cooter & Gell*, 496 U.S. at 404 (quoting *Pierce v. Underwood*, 487 U.S. 552, 562 (1988)). District courts need the flexibility afforded by deferential appellate review to "resolve questions involving multifarious, fleeting, special, narrow facts that utterly resist generalization." *Koon*, 64 U.S.L.W. at 4517 (quotations omitted). Moreover, because "[t]rial judges have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record," the district court should have more flexibility than that accorded by the panel below to determine whether in fact a hearing is required and held on a routine pretrial motion. *See Gasperini*, 64 U.S.L.W. at 4613 (citations omitted). In contrast, the overarching constitutional issue present in *Ornelas*, which held that a district court's determination of whether there was probable cause to justify a warrantless search and reasonable

suspicion to make an investigatory stop must be reviewed *de novo*, is not present here. The panel ignored these principles in snatching from the district court the authority to determine the nature of its own proceedings.

"[P]ractical reasons" should determine the appropriate standard of review by the courts of appeals. *Gasperini*, 64 U.S.L.W. at 4613; *see Ornelas*, 116 S. Ct. at 1663 (Scalia, J., dissenting). This Court is willing to authorize appellate deference on matters frequently encountered by district courts. *E.g.*, *Koon*, 64 U.S.L.W. at 4517. When "the district court is 'better positioned' than the appellate court to decide the issue in question or . . . probing appellate scrutiny will not contribute to the clarity of legal doctrine," then "deferential review of mixed questions of law and fact is warranted." *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991) (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). These principles also were not considered by the panel below.

In this case, both practical considerations under the Act and the institutional differences between district and appellate courts argue in favor of a more deferential review of the district court's perception of whether a hearing is required and has in fact been held, than that afforded by the panel. The panel failed to articulate why the *de novo* standard it adopted "reflect[ed] an accommodation of the respective institutional advantages of trial and appellate courts." *Salve Regina College*, 499 U.S. at 233.

As a practical matter, the panel also ignored several factors that typically would be of consequence to a district court. For example, the panel failed to consider whether either party requested a hearing, and whether the district court notified the parties that a hearing would take place. The panel gave no reasons for not considering these important factual circumstances.

Furthermore, the nature of the colloquy between the district court and the party, as viewed by the district court,

merited further consideration than that afforded by the panel. A district court "on the front lines of litigation," *Cooter & Gell*, 496 U.S. at 404, simply is in a better position than an appellate court to determine whether a brief exchange initiated by it *sua sponte* constitutes a "hearing." The panel opinion did not consider this.

5. The panel's opinion will foster uncertainty in the judicial process by its teaching that litigants cannot rely on what is said on the record by the district court in the statutory speedy trial context. In this case, the district court repeatedly informed the parties -- both orally and in writing -- that it was taking the motion in limine "under advisement," and indicated that it would be prepared to rule on the papers. The parties never requested a hearing, and the district court never indicated one was necessary or held. The district court reaffirmed its view by its order denying Petitioner's motion to dismiss, in which the district court again stated that it had taken the motion in limine "under advisement." Pet. App. 21. This ruling came after Petitioner had briefed the precise issue of Subsection (J)'s application. The prosecutor's opposition to the motion to dismiss did not argue that a hearing had been held -- even though the colloquy with the district court had occurred on the previous day.

On this record, it is plain that the district court did not consider a hearing necessary, and that its view was clear to the parties. No notice was provided that a hearing would be held or had been held.[10] The record contains instances -- unrelated to the motion in limine -- where the district court stated plainly that it intended to hold a hearing, and then set a date

[10] Certainly notice to the parties is a core element of what constitutes a hearing in most, if not all, contexts. *Cf. United States v. Hayman*, 342 U.S. 205, 220 (1952); Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1280-81 (1975), *cited with approval in, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 446 (1985); *Ingraham v. Wright*, 430 U.S. 651, 672, (1977); *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

for the hearing -- thereby providing the parties with the requisite notice. Indeed, following and in contrast to the bare colloquy at issue here, the district court asked the parties if "a hearing" was required on another defense motion filed a few days earlier. Pet. App. at 61. The panel should not have so completely disregarded what the parties and district court said, did, and understood below.

The phrase "under advisement" is not an arcane term of art that is difficult to comprehend. To the contrary, it is a straightforward term commonly understood by litigants to mean that the district court has closed the record. Nevertheless, without support the panel below determined that the district court either did not say what it meant or did not mean what it said. If the panel's opinion is allowed to stand, such disregard will cause the judicial declaration that a matter is "taken under advisement" to have no meaning.[11] Undercutting the parties' reliance upon a district court's pronouncements is not consistent with the efficient administration of justice in the federal courts.

B. THE OPINION BELOW IS INCONSISTENT WITH THE LANGUAGE AND STRUCTURE OF, AND LEGISLATIVE INTENT BEHIND, THE SPEEDY TRIAL ACT.

1. The panel opinion is not consistent with Congressional intent that, except for exceptional instances requiring extended deliberation or preparation, cases should be speedily tried. The thrust of the Act's statutory scheme is prompt disposition of pretrial motions except where the district court be-

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[11] *Cf. United States v. Jones*, 23 F.3d 1307, 1315 (8th Cir. 1994) (Beam, J., concurring) ("As it stands, parties and courts understand that once a motion is filed, the speedy trial clock is stopped until the matter is 'under advisement.' The moment at which a matter comes 'under advisement' is usually marked by some bright-line event such as conclusion of a hearing; the end of a briefing schedule; or *a judicial declaration*.") (Emphasis added).

lieves a hearing is warranted. Congress intended that Subsection (J) limit the amount of time in which a district court may consider a motion after a hearing has been held as well as the amount of time in which the district court may consider a motion where no hearing is required. *See Henderson*, 476 U.S. at 329. The panel opinion effectively undercuts this scheme and renders Subsection (J) toothless because an appellate court may decide well after the fact that a hearing was held despite no party having requested one, and despite the district court's express determination to take the matter "under advisement." In such cases, Subsection (J) will have been read effectively out of the Act.[12]

Moreover, Congress did not intend to exclude long periods of time in cases where pretrial motions are not complex.

> Indeed, if motions are so simple or routine that they do not require a hearing, necessary advisement time should be considerably less than 30 days. Nor does the Committee intend that additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary.

S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979); *see also, e.g.*, H.R. Rep. No. 1508, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7426. Congress intended that "in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple." S. Rep. No. 212 at 34.

The motion in limine in this case indisputably involved straightforward questions of law. No evidence was presented in support of or in opposition to the motion. The seizure by

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[12] This Court has emphasized that courts should not construe statutes to render portions superfluous. *Bailey v. United States*, 116 S. Ct. 501, 506-07 (1995); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

the panel of a routine, polite, and perfunctory colloquy between a party and the district court, in order to justify under Subsection (F) the exclusion of nearly one year of otherwise non-excludable time under the clear command of Subsection (J), is in striking conflict with Congress' understanding of how the Act would be applied in cases involving routine pretrial motions.

2. The panel opinion erases the predictability and certainty sought by Congress in the Speedy Trial Act.[13] By affording courts of appeals the opportunity to second-guess the district court's determinations, the panel's opinion leaves the parties unsure at the time of the proceeding in the district court whether time ultimately will be found excludable under Subsection (F) or not excludable under Subsection (J). As such, it will be "impossible to determine with precision when the right has been denied." *Barker v. Wingo*, 407 U.S. 514, 521 (1972).[14] "One does not need to expatiate upon the value of certainty in a developed legal system. Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." BENJAMIN J. CARDOZO, THE GROWTH OF THE LAW 3 (1924).

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[13] The courts of appeals have emphasized consistently the importance of preserving a bright-line approach in the Act in order to ensure predictability and certainty in determining the existence of the statutory speedy trial right and violations thereof. *E.g.*, *United States v. Palomba*, 31 F.3d 1456, 1463 n.5 (9th Cir. 1994); *United States v. Mobile Materials, Inc.*, 871 F.2d 902, 917 (10th Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990); *United States v. Campbell*, 706 F.2d 1138, 1143 n.9 (11th Cir. 1983).

[14] *Cf. United States v. Springer*, 51 F.3d 861, 865 (9th Cir. 1995) (where pretrial motion ultimately is deemed frivolous, time between filing and hearing remains excluded under Subsection (F) because a contrary holding would require the "district court to assess the merits of a motion before it determines that an exclusion of time will be permitted" and such a "circular process . . . would cause untold confusion and open new vistas of manipulation").

3. The panel's opinion flouts the language and structure of Subsection (F) and Subsection (J) of the Act by commending to the court of appeals, rather than the district court, the determination of whether a hearing is required and held on a pretrial motion. The Act leaves to the district court the decision whether a hearing is required and has been held on pretrial motions.

Pretrial case management is uniquely within the purview of the district court. This is reflected throughout the Act. According to 18 U.S.C. § 3161(h)(8), for example, the district court is required to state on the record the reason for a continuance. Unlike here, where the panel completely disregarded -- without record support -- the district court's repeated statements that it was taking or had taken the matter "under advisement," appellate courts "will reverse a district court's finding of an 'ends of justice' exception only if there is clear error." *United States v. Lewis*, 980 F.2d 555, 558 (9th Cir. 1992) (citation omitted); *see also United States v. Wimberly*, 60 F.3d 281, 284 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 744 (1996). The panel's *de novo* standard is inappropriate.

C. THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR DECISIONS CONSTRUING THE SPEEDY TRIAL ACT.

In both *Henderson* and *United States v. Taylor*, 487 U.S. 326 (1988), this Court acknowledged the need for clarity in administration of the Act, and the central role played by district courts in the administration of the Act. Both tenets were disregarded by the panel.

1. The panel's opinion misconstrued *Henderson* to require "a relatively broad definition of 'hearing.' " Pet. App. 9. What *Henderson* actually requires are precise definitions faithful to the statutory text and structure, as well as to Congress' intent. *Henderson* stressed the clear dichotomy in the Act's provisions regarding treatment of pretrial motions. The

question of whether a motion "requires" a hearing or is taken "under advisement" must, *Henderson* implied, in the first instance be left to the district court. Whichever course the district court chooses, the parties must be apprised at the time so they know where they stand.[15]

By eschewing bright lines, the panel opinion is inconsistent with *Henderson*'s determination that a *per se* rule regarding the excludable nature of *all* Subsection (F) delay is faithful to the structure of the Act and therefore appropriate. The virtues of such a predictable approach to the statutory speedy trial right were recognized by Congress. More generally, this Court has observed as a policy preference that bright-line rules provide beneficial specificity, clear and unequivocal guidelines, and avoid difficulties attendant to *ad hoc* adjudication. *E.g.*, *Arizona v. Roberson*, 486 U.S. 675, 681-82 (1988); *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

By holding that under Subsection (F) there is effectively no limit for excludable time between the filing of pretrial motions and hearings on them, this Court placed a premium on the clear determination of whether, according to the district court at the time, a motion requires a hearing at all. The panel opinion, by holding that the district court's view "cannot be dispositive," Pet. App. 11, dilutes this approach. Proper application of *Henderson* depends upon the parties knowing during the pendency of the pretrial proceedings whether the speedy trial clock is running.

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[15] *See United States v. Henderson*, 746 F.2d 619, 623 (9th Cir. 1984)("It is important that the court and the parties know when the clock stops running under the Act. It is even more important that they know when it starts again. But if the start is to be at the point when the passage of time becomes 'unreasonable,' even if the period of delay mentioned in the statute has not expired, neither the court nor the parties can know where they stand."), *aff'd*, 476 U.S. 321 (1986).

Henderson spoke of the need within the framework of the Act to afford district courts time necessary to decide pretrial motions before them. 476 U.S. at 331. This does not mean, as the panel concluded, Pet. App. 9, that *any* record discussion with a party is necessarily a hearing. In the wake of *Henderson*'s holding, which left open-ended the period of prehearing delay under Subsection (F), a narrower definition of "hearing" is appropriate. Otherwise, contrary to Congress' intent, Subsection (F) will too easily swallow whole the limitation set forth in Subsection (J).

2. The opinion below also conflicts with this Court's explication of the proper role accorded district courts under the Act, as set forth in *Taylor*. In *Taylor*, this Court construed the "abuse of discretion" standard applied to review the district court's determination to dismiss an indictment with prejudice upon a violation of the Act. *See* 487 U.S. at 337-44. "Because 'prejudice' may take many forms, such determinations must be made on a case-by-case basis in the light of the facts." *Id.* at 341 n.13. "[W]hen the statutory factors are properly considered, and supporting factual findings are not clearly in error, the district court's judgment . . . should not lightly be disturbed." *Id.* at 337.

Taylor emphasized that a district court must explain the grounds for its decision, so that the court of appeals can exercise meaningful review. "[T]he administration of the Speedy Trial Act and the necessity for thorough appellate review require that a district court carefully express its decision whether or not to bar reprosecution in terms of the guidelines specified by Congress." *Id.* at 343. Likewise, the district court is in the best position to determine, in light of the facts, whether a hearing was required and held. By ignoring the district court's characterizations of what it intended and what had occurred, the panel below diminished the role of the district court in administering the Act in the first instance, subject to limited appellate review, as contemplated by *Taylor*.

CONCLUSION

For the foregoing reasons, we respectfully request that the petition for a writ of certiorari be granted.

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July 5, 1996

APPENDIX

TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Fifth Circuit, Feb. 22, 1996.....App. 1

Order of the United States District Court, Northern District of Dallas, denying Motion to Dismiss Indictment, Mar. 11, 1994.....App. 21

Order from the United States Court of Appeals for the Fifth Circuit denying the Petition for Rehearing and Suggestion for Rehearing En Banc, Apr. 9, 1996.....App. 25

Constitutional Provision Involved:

U.S. CONST. amend. VI.....App. 27

Statutory Provision Involved:

18 U.S.C. § 3161 (1985).....App. 28

Miscellaneous:

Defendant's Motion to Dismiss Indictment Because of a Violation of the Speedy Trial Act and Incorporated Memorandum (N.D. Tex. Mar. 3, 1994).....App. 36

Opposition of the United States to Defendant's Motion to Dismiss the Indictment Under the Speedy Trial Act (N.D. Tex. Mar. 4, 1994).....App. 43

Defendant's Motion and Memorandum in Limine to Exclude Evidence of Subsequent Financial Conditions or Events (N.D. Tex. Jan. 27, 1992).....App. 46

Government's Response to Defendant's Motion and Memorandum in Limine to Exclude Evidence of Subsequent Financial Conditions or Events (N.D. Tex. Feb. 3, 1992).....App. 49

Defendant's Reply to Government's Response to Defendant's Motion in Limine to Exclude Evidence of Subsequent Financial Conditions or Events (N.D. Tex. Feb. 25, 1992) ..... App. 52

Transcript Excerpt from Pretrial Conference on May 7, 1992 ..... App. 54

Order taking Defendant's Motion to Exclude Evidence of Financial Conditions or Events Under Advisement (N.D. Tex. May 13, 1992) ..... App. 56

Order Resetting Pretrial Conference (N.D. Tex. Feb. 24, 1994) ..... App. 59

Transcript Excerpt from Pretrial Conference on Mar. 3, 1994 ..... App. 60

Order granting Motion in Limine to Exclude Evidence of Subsequent Financial Conditions or Events (N.D. Tex. Mar. 9, 1994) ..... App. 62

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10922

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH GROSZ,

Defendant-Appellant.

FILED FEB. 22, 1996

Appeal from the United States District Court
for the Northern District of Texas

Before REAVLEY, JOLLY, and WIENER, Circuit Judges.
E. GRADY JOLLY, Circuit Judge:

In this case, involving crimes of bank fraud, we primarily consider Joseph Grosz's contention that the district court violated the Speedy Trial Act, 18 U.S.C. § 3161-3174, by allowing 354 non-excludable days to elapse between the final disposition of Grosz's interlocutory appeal and the filing of his motion to dismiss. The crucial question is whether the proceeding conducted four days before trial, relating to Grosz's pending motion in limine, constituted a hearing within the meaning of the Act. We hold that the court did in fact conduct a hearing. Thus, the 354 days in question are properly excludable from calculation under the Speedy Trial Act. As to the other issues raised by Grosz, including that various instances of prosecutorial misconduct deprived him of a fair trial and that his conspiracy conviction is barred by double jeopardy, we find them meritless. Accordingly, we affirm Grosz's convictions.

I

Grosz was a commercial lending officer for San Jacinto Savings Association ("San Jacinto"), located in Houston, Texas. James P. McClain was a Texas businessman involved in real estate. In late 1984 or early 1985, during a flight to Chicago on McClain's private plane, Grosz and McClain devised a scheme jointly to purchase control of a Chicago savings and loan.

In order to generate funds to purchase the savings and loan in accordance with their plan, Grosz helped McClain to obtain a loan from People's Heritage Federal Savings and Loan Association ("People's") through a series of related transactions ("Plano/Flower Mound II Transactions"). In pertinent part, Grosz, acting in his capacity as a lending officer for San Jacinto, arranged for San Jacinto to release a second lien it held on forty-three acres of undeveloped land in Plano, Texas, to subordinate a lien it held to a People's lien, and to waive its rights under an agreement that would have entitled San Jacinto to receive $1.5 million from McClain at the closing of one of the transactions. San Jacinto did not receive any consideration in return for these actions. Grosz, however, received from McClain $1 million of the proceeds of People's loan. McClain also provided to Grosz $600,000 of his profits from two "land flip" transactions[1] involving San Jacinto ("Bedford and Flower Mound I Transactions").

Shortly after the Plano/Flower Mound II Transactions, McClain decided that he no longer wanted to own or control a savings and loan. McClain asked Grosz to return half of the money. The two men ultimately agreed that Grosz would return $600,000 of the $1.6 million diverted to Grosz. Grosz actually paid McClain only $360,000 of this amount through

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[1] *See United States v. Sallee*, 984 F.2d 643, 644 (5th Cir. 1993) (describing land flips).

two checks, one for $210,000 dated September 26, 1986, and the other for $150,000 dated December 9, 1987.[2]

II

Grosz was charged on December 11, 1991 in a twelve-count indictment for the offenses of conspiracy to commit bank fraud, bank fraud, unlawful receipt of gifts for procuring loans, misapplication of loan funds, wire fraud, and aiding and abetting the commission of these offenses. He was arraigned on January 16, 1992. Grosz's counsel filed seventeen pretrial motions on January 27, including a motion to dismiss on double jeopardy grounds and a motion in limine to exclude evidence of subsequent financial conditions and events. The government responded to these motions on February 3. On May 7, the district court held the first pretrial conference. The court ruled orally on seven of Grosz's motions. The court also entered an order denying Grosz's double jeopardy motion and one other motion. Finally, the court stated that it was going to keep the remaining motions, including the motion in limine, "under advisement" pending resolution of Grosz's interlocutory appeal from the denial of his double jeopardy motion.

This court affirmed the district court's denial of Grosz's double jeopardy motion in an unpublished opinion. *United States v. Grosz*, 977 F.2d 577 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1284, 122 L.Ed.2d 676 (1993). The interlocutory appeal formally concluded on March 4, 1993. The district court next took action on November 15, 1993, more than eight months later, when it denied one of seven pending motions without a hearing. Between that day and March 2, 1994, the court ruled on five of the remaining six motions without conducting a hearing on any of them. Grosz filed a motion to dismiss the indictment

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[2] The second check was made payable to Sharon Mains, who was then McClain's girlfriend.

for pre-indictment delay on February 22, 1994. On March 3, the district court held the second pretrial conference, at which it granted Grosz's pending motion in limine after a brief exchange with an attorney for the government. Although present in the court at that time, Grosz's counsel was not addressed by the district court until after the court had ruled on the motion in limine. Grosz filed a motion to dismiss for a violation of the Speedy Trial Act on March 8. The court denied this motion on March 11.

Grosz chose not to testify at trial. Grosz's counsel suggested that McClain, who was testifying under a plea agreement, was fabricating his testimony to assist the government. In opening and closing arguments, Grosz's counsel maintained that the $600,000 that Grosz received from McClain was a loan made "in connection with investments that Mr. McClain wanted to do with Mr. Grosz." When the "investments" failed to materialize, counsel argued, Grosz returned a substantial portion of the money to McClain.

Grosz's counsel also argued that the $1 million payment was for "consulting work" that Mr Grosz did "in connection with a real estate transaction involving Mr. McClain." Grosz's counsel did not introduce any evidence of a consulting agreement. An accountant testified on behalf of Grosz that he entered the money on the books of Mortgage & Equity Resources, a Chicago real estate brokerage owned by Grosz and his wife, as a "commission." Grosz also denied that San Jacinto received no benefit in return for the various rights it waived in connection with the Plano/Flower Mound II Transactions. He produced witnesses to testify to that effect.

Grosz was convicted of conspiring to commit bank fraud (Count 1); bank fraud (Count 10); and unlawful receipt of gifts for procuring loans (Counts 11 and 12). Counts 10 through 12 involved the Plano/Flower Mound II Transactions. Grosz was acquitted of the other eight counts on which he was indicted, all relating to the Bedford and Flower Mound I

Transactions. The court sentenced him to five years' imprisonment on the conspiracy count, to be followed by concurrent five-year terms of probation on the remaining three counts of conviction. Grosz was also ordered to pay restitution in the amount of $1,600,000 and special assessments.

III

Grosz first contends that the district court should have dismissed his indictment based on a violation of the Speedy Trial Act because 354 non-excludable days elapsed between the final disposition of his interlocutory appeal and the filing of his motion to dismiss (March 5, 1993, to February 21, 1994). Specifically, Grosz asserts that an exchange in open court, shortly before trial, between the district judge and a government attorney concerning Grosz's pending motion in limine did not constitute a hearing triggering an exclusion of the 354 days under 18 U.S.C. § 3161(h)(1)(F). This court reviews the factual findings supporting a Speedy Trial Act ruling using the clearly erroneous standard and the legal conclusions *de novo*. *United States v. Tannehill*, 49 F.3d 1049, 1051 (5th Cir.) (citation omitted), *cert. denied*, ___ U.S. ___, 116 S.Ct. 167, 133 L.Ed.2d 109 (1995).

A

"The Speedy Trial Act is designed to ensure a federal defendant's Sixth Amendment right to a speedy trial, and to reduce the danger to the public from prolonged periods of the defendant's release on bail." *United States v. Johnson*, 29 F.3d 940, 942 (5th Cir. 1994). It requires that a defendant be tried within seventy days of indictment or of the day the defendant first appears before the judge or magistrate, whichever is later. 18 U.S.C. § 3161(c)(1) (1994). If more than seventy days pass between this date and the trial, the "indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2) (1994).

Certain delays are excluded from this calculation under section 3161(h). Section 3161(h)(1)(F) ("Subsection F")

excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(F) (1994). "Once a hearing has been held on a motion and all necessary additional materials submitted to the court, or once a motion not requiring a hearing is filed along with necessary supporting materials, § 3161(h)(1)(J) limits the excluded period to thirty days." *United States v. Bermea*, 30 F.3d 1539, 1566 (5th Cir. 1994) (citing *Henderson v. United States*, 476 U.S. 321, 329, 106 S.Ct. 1871, 1876, 90 L.Ed.2d 299 (1986)), *cert. denied sub nom., Rodriguez v. United States*, ___ U.S. ___, 115 S.Ct. 1113, 130 L.Ed.2d 1077 (1995), *and cert. denied sub nom., Garza v. United States*, ___ U.S. ___, 115 S.Ct. 1825, 131 L.Ed.2d 746 (1995).

The Supreme Court has established that Subsection F excludes "all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" *Henderson*, 476 U.S. at 330, 106 S.Ct. at 1877. The Supreme Court observed that although Congress recognized the potential for abuse of the exclusion provided by Subsection F, "Congress clearly envisioned that any limitations should be imposed by circuit or district court rules rather than by the statute itself." *Id.* at 327-28, 106 S.Ct. at 1875-76.

The crucial question under Subsection F is whether a hearing was held on a motion. Clarifying prior Fifth Circuit precedent, the court in *Johnson* held that the speedy trial clock is not tolled simply because a pretrial motion is pending. "Instead, a court must look more closely into the particular circumstances of that motion, *e.g.*, whether there was a hearing on the motion, or whether the motion was taken under advisement, to determine whether certain days are excludable." *Johnson*, 29 F.3d at 943 & n.3 (citation omitted). The court focused specifically on the question whether a hearing was held on each of the four motions at issue in *Johnson*. *Id.* at 943-45. For example, it concluded that "because no hearing

of any sort preceded the court's ruling, we consider the [defendant's motion in limine] to have been under advisement beginning on . . . the date the motion was filed." *Id.* at 944. The court noted that "[t]he result we reach in this case might well be different had the trial court held a hearing immediately before or during trial on the motion in limine or the *James* motion, typically a motion postponed until trial." *Id.* at 944 n.8.[3]

B

This case presents the question whether, within the meaning of the Speedy Trial Act, the proceeding at the second pretrial conference[4] constituted a hearing on Grosz's pretrial motion in limine.[5] If it constituted a hearing, there will have

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[3] The court in *Bermea* concluded that pending *James* motions do toll the speedy trial clock when they are heard and ruled upon at trial. 30 F.3d at 1568.

[4] The district court held the second pretrial conference four days prior to the beginning of the trial.

[5] The following exchange occurred at the second pretrial conference:

> THE COURT: 91-390, United States versus Grosz. It appears we have two motions currently pending. One of them is the defendant's motion in limine to exclude evidence of subsequent financial conditions, and then defendant's motion to dismiss the indictment based on preindictment delay.
>
> All right. Does the government oppose the defendant's motion in limine?
>
> MR. FRANK: Yes, sir.
>
> THE COURT: On what basis?
>
> MR. FRANK: We believe that the evidence of loss occasioned by the transactions in which this defendant participated in shows evidence of intent and also a pattern of dealings with these institutions. And the jury should be able to consider this evidence to fully appreciate the extent of the defendant's conduct in this particular series of transactions which resulted in substantial losses for two different financial institutions.

been no violation of the Speedy Trial Act because the clock would have been tolled at least until the hearing. If it did not constitute a hearing, the Speedy Trial Act will have been violated because the clock would have started running again after completion of Grosz's interlocutory appeal on March 4, 1993.[6] *See* 18 U.S.C. § 3161(h)(1)(E) (1994).

The Fifth Circuit observed in a recent case that the Speedy Trial Act itself does not define "hearing" and noted that it could not find any authorities addressing the issue. *Tannehill*, 49 F.3d at 1053. Emphasizing the importance of interpreting the term in the context of the Speedy Trial Act,

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THE COURT: Would your agreement [sic] be the same if the properties had sold at a profit?

MR. FRANK: I believe the jury should be entitled to understand exactly what did happen to the properties as to whether they were profitable or sold at a loss.

It's important to know how this defendant's activities and arrangements for these loans and approving these loans played into the overall financial structure of the institutions and what ultimately happened to these entities.

THE COURT: I'm going to grant the motion in limine. The government shall not refer to any losses on the properties in the presence of the jury without first approaching the court and obtaining a ruling from the court if you intend to offer such evidence.

All right. Defendant's motion to dismiss the indictment.

Is this motion going to require a hearing?

MR. SAMUELS: Good morning, Your Honor, Elliott Samuels on behalf of Mr. Grosz.

[6] In its order denying Grosz's motion to dismiss, the district court ruled that the pendency of the motions held "under advisement" from the first pretrial conference tolled the speedy trial clock under Subsection F without reaching the "hearing" question. This rationale was plainly incorrect. Nevertheless, we may affirm the judgment of the district court on any basis supported by the record. *Soujourner T. v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1414, 122 L.Ed.2d 785 (1993), *and cert. denied sub. nom.*, *Connick v. Soujourner T.*, ___ U.S. ___, 113 S.Ct. 1414, 122 L.Ed.2d 785 (1993).

id. (citations omitted), the court declared that because Congress was addressing preliminary motions in Subsection F, it could not have meant to require the presentation of testimony or other evidence for there to be a "hearing." *Id.* It did not determine the "precise parameters" of a "hearing" because it concluded that the term "includes a situation in which the district court hears argument of counsel and considers it prior to making its ruling, as was done in this case." *Id.*

Tannehill's approach to the problem of interpreting "hearing" plainly indicates that Grosz's reliance on due process cases to define "hearing" for purposes of Subsection F is misplaced. *See*, e.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985). Instead, we must look to the Speedy Trial Act itself. In holding that the Speedy Trial Act excludes time after a hearing to await additional filings from the parties, the Supreme Court emphasized that "[t]he provisions of the Act are designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion." *Henderson*, 476 U.S. at 331, 106 S.Ct. at 1877 (citing S.Rep. No. 96-212, pp. 9-10 (1979)). This purpose identified by the Supreme Court suggests that a relatively broad definition of "hearing" is appropriate.

A review of the transcript from the second pretrial conference convinces us that the exchange between the district court and the government constituted a "hearing" for purposes of the Speedy Trial Act. As in *Tannehill*, we need not determine the precise parameters for a "hearing" in this context because the term includes a situation, as here, in which the district court hears the argument of, and questions, counsel for the party against whom the ruling on the motion is made.

The district court's disposition of other pretrial motions supports our conclusion that this was a "hearing" for purposes of Subsection F. On the day before the second pre-

trial conference, the district court ruled on four other motions (which similarly had been pending since the first pretrial conference) based only on the filings of the parties. That the district court chose not to rule on the motion in limine at the same time indicates that the district court needed additional information or clarification in order to dispose of the motion, which it obtained through its questioning of the government attorney the next day.[7]

Grosz, arguing for a different application of the statute, points out that 18 U.S.C. § 3161(h)(1)(J) (Subsection J) applies to motions "actually under advisement by the court." Grosz then argues that the district court's statement at the first pretrial conference that he was taking the motion "under advisement" when describing the status of the motion in limine establishes that it was a non-hearing motion for which only thirty days were excludable pursuant to Subsection J. *Henderson*, 476 U.S. at 329, 106 S.Ct. at 1876. Grosz also contends that this motion was a non-hearing motion because the parties never requested and the district court never formally set a hearing on it. We are not persuaded by these arguments.

The plain language of neither Subsection F nor Subsection J requires a court to make any on-the-record findings as to the status of a motion.[8] The exclusion for a continuance provided by section 3161(h)(8), in contrast, requires a court to "set[] forth, in the record of the case, either orally or in writing, its reasons . . . ." 18 U.S.C. § 3161(h)(8). This difference in statutory language in the same section leads us to the con-

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[7] We acknowledge that we would not recognize the exchange as a "hearing" if the record demonstrated an attempt on the part of the district court or the government to manufacture a "hearing" to avoid the operation of the Speedy Trial Act. *See United States v. Walker*, 960 F.2d 409, 413 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 443, 121 L.Ed.2d 362 (1992). Such is not the case here.

[8] Nor do our cases suggest such a requirement. *See, e.g., Tannehill*; *Johnson*.

clusion that a court's description of the status of a motion cannot be dispositive of the question whether a motion is "actually under advisement" for purposes of Subsection J. Similarly, the language of Subsection F does not impose a requirement that the court formally set a motion for hearing. As indicated above, the crucial question concerning the exclusions provided by Subsection F and Subsection J is whether the court actually holds a hearing on a motion.

C

We thus conclude that the district court properly excluded the time between the end of Grosz's interlocutory appeal and the hearing on the motion in limine under Subsection F. The trial having commenced within seventy non-excludable days of Grosz's first appearance before the court, there was no violation of the Speedy Trial Act in this case.

IV

Grosz next raises a number of claims concerning alleged prosecutorial misconduct that supposedly deprived Grosz of a fair trial. We address three of those claims below.[9]

A

Grosz asserts that the government persistently and "impermissibly invited the jury to infer Mr. Grosz's guilt from his constitutionally protected silence" in its closing argument.[10] It is, of course, improper for a prosecutor to com-

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[9] After a review of the briefs of the parties and the record, we hold that the following instances of alleged prosecutorial misconduct are lacking in any merit and do not require discussion: (1) the alleged false testimony of Jerry Nicholson and (2) the alleged improper cross-examination of a defense handwriting expert.

[10] Grosz points to the following remarks by the government:

(1) "There is no evidence in this case of the plane ride that he discussed with Mr. Grosz did not happen --"

(2) "The only testimony that's out there is he went on this plane ride --"

ment on a defendant's exercise of his Fifth Amendment rights. *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965). The government is not prohibited, however, from commenting on the defense's failure to counter or explain the evidence as opposed to the defendant's failure to testify. *United States v. Guzman*, 781 F.2d 428, 434 (5th Cir.), *cert. denied*, 475 U.S. 1143, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986); *United States v. Bright*, 630 F.2d 804, 825 (5th Cir. 1980).

This court applies a two-tiered test to Grosz's claim. The court first must determine whether the remarks were constitutionally impermissible. If the court finds them to be impermissible, the court must consider whether they were harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The test for determining whether the prosecutor's remarks were constitutionally impermissible is: "(1) whether the prosecutor's manifest intent was to comment on the defendant's silence or (2) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on

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(3) "With respect to why Joe Grosz received the $1 million through Mortgage and Equity Resources, the only explanation that has been offered in this case for why that money was paid is --"

(4) "Ladies and gentlemen, the only explanation that has come from that witness stand as to why this money was paid, the $1 million, is the testimony of James P. McClain . . . ."

(5) "McClain's statement stands alone . . . ."

(6) "Ladies and Gentlemen, there is simply no other explanation that I have heard other than Mr. McClain's as to why this money has been paid --"

(7) "Well, McClain has given you the only explanation that has ever been offered, and that was to further the stock purchase agreement . . . ."

(8) "That's why Mr. Grosz has been hesitant to come forward with information that, oh yeah, I brokered the deal."

the defendant's silence." *United States v. Collins*, 972 F.2d 1385, 1406 (5th Cir. 1992) (internal quotation and citation omitted), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993), *and cert. denied sub nom., Ross v. United States*, ___ U.S. ___, 113 S.Ct. 1812, 123 L.Ed.2d 444. The prosecutor's intent is not manifest if there is some other, equally plausible explanation for the remark. *Id.* As for the second possibility, "'the question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury *necessarily* would have done so.'" *Id.* (quoting *United States v. Carrodeguas*, 747 F.2d 1390, 1395 (11th Cir. 1984), *cert. denied sub nom., Hernandez-Cartaya v. United States*, 474 U.S. 816, 106 S.Ct. 60, 88 L.Ed.2d 49 (1985)). Both inquiries are properly conducted by reviewing the challenged remarks in context. *United States v. Jones*, 648 F.2d 215, 218 (5th Cir. 1981).

In the context of the case, the first seven of eight remarks challenged by Grosz clearly focused on the defense's failure to counter the government's evidence. As such, they are not constitutionally impermissible comments on Grosz's decision not to testify. *Guzman*, 781 F.2d at 434. The remark that appears on its face to be most damaging is the one in which the government uses Grosz's name. The immediate context illuminates the meaning of this remark:

> If Mr. Grosz is pretending or suggesting to you that he could on the one hand release this lien on the Plano property and then turn around and accept a million dollar brokerage commission from the sale of that property from McClain to Nicholson, I would suggest to you that you read again Government's Exhibit Number 23, the conflict of interest policy of San Jacinto Savings and Southmark Corporation, which tells you point blank that you can't do that.

> That's why Mr. Grosz has been hesitant to come forward with information that, oh yeah, I brokered that deal.

We hold that this statement, when read in context, does not manifest the government's intent to comment on Grosz's failure to testify. Instead, it offers to the jury a reason why the defense failed to show clearly that Grosz brokered the deal:[11] such a contention would have been contrary to the express conflict of interest policies of San Jacinto and Southmark. Thus, we are persuaded that the jury would not "naturally and necessarily" have construed it as a comment on his failure to testify.

B

Grosz next argues that the government intentionally elicited false testimony from McClain. The testimony concerned the $150,000 check drawn on a bank account of Mortgage & Equity Resources, Grosz's Chicago real estate brokerage firm, made out to Sharon Mains. Through the witness' testimony, the government suggested that the check had been altered, which was false.[12] Grosz asserts that the government

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[11] From its opening statement, the defense attempted unsuccessfully to establish a "consulting agreement" theory for the receipt of the $1 million from McClain.

[12] The following exchange occurred near the conclusion of McClain's testimony on direct:

> Q. Mr. McClain, is there something unusual about this check, other than it's made payable to your girlfriend?
>
> A. Well, it's like about every other document that's in here.
>
> Q. What's unusual about this check?
>
> A. If you notice the check is made out in handwriting. The -- this represents final payment by which note for $600,000.00 is paid in full, was typed on -- with a typewriter.
>
> Q. You're referring to a note that appears directly below the handwritten name of Sharon Mains on the check?
>
> A. Yes, that's correct.

knew that the check had not been altered after McClain received it when it engaged in this line of questioning. He contends that the bank had provided the government with a microfiche copy of the check years before the trial in response to a subpoena, which revealed that the check had cleared two days after it was issued with the typewritten notation on it.

Grosz must show that the following to obtain reversal of his conviction on the grounds that the government elicited false testimony: (1) the testimony was false, (2) the prosecution knew it was false, and (3) it was material. *United States v. Scott*, 48 F.3d 1389, 1394 (5th Cir.) (citation omitted), *cert. denied*, ___ U.S. ___, 116 S.Ct. 264, 133 L.Ed.2d 187 (1995). The false testimony is material if there is "any reasonable likelihood" that it could have "affected the judgment of the jury." *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972).

Grosz's claim fails because the record contains insufficient evidence to prove that the government elicited this testimony knowing it to be false. Grosz argues that the government had been furnished a microfiche copy of the check from the bank. He relies *solely* on the testimony of an FBI agent involved in subpoenaing documents from the bank:

> Q. All right. Would you -- by the way, when you subpoenaed the Boulevard Bank records you got a microfiche copy of the check, did you not?

> Q. What is suggested to you by the fact that part of the document is completed in handwriting and part of it is completed in typewriting?
>
> A. I would assume, as most of these other documents, that this was done at a later time.
>
> Q. Do you know of your own personal knowledge as to whether or not this typewritten note was on the document at the time it was received by Sharon Mains?
>
> A. No, because I was not in the city in which Sharon received the check at the time.

A. Yes, *they* would have been microfiche.

(Emphasis added). Since the agent had already testified that he had not reviewed the documents subpoenaed from the bank and had never seen a copy of the check, this answer cannot be viewed as a clear admission that the government had obtained a microfiche copy of the check in question; more likely, the statement is only an acknowledgement that the subpoenaed documents would have been microfiched copies.[13]

Even if the record showed that the government knowingly elicited this testimony, Grosz's claim would still fail because the testimony was not material. This is not a case in which the false testimony remained uncorrected throughout the trial. Instead, Grosz conclusively refuted McClain's testimony by the introduction of the microfiche copy of the check and by his examination of the FBI agent concerning this copy of the check. The jury therefore could not have relied on this testimony to draw any adverse inference against Grosz. This testimony and its refutation also allowed Grosz to assert in his closing argument that he was the victim of a "very overzealous prosecution." In the light of the foregoing, we cannot say that there was "any reasonable likelihood" that the jury's judgment was affected by this false testimony.

C

Grosz also argues that the government knowingly allowed the false testimony of a government witness to stand uncorrected. According to Grosz, Edwin T. McBirney[14] falsely testified that his lawyers had not filed a Rule 35 mo-

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[13] The government argues in its brief that the relevant subpoenas show that the check in question was outside the scope of the government's request for documents. We do not address this contention because the subpoenas are not part of the appellate record.

[14] McBirney was the former head of Sunbelt Savings. He testified about his role in the Plano/Flower Mound II Transactions. He was testifying pursuant to a plea bargain upon which he was sentenced to fifteen years in prison.

tion to reduce his sentence.[15] Because of this denial, Grosz claims that the jury was left with the impression that no reme-

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[15] Grosz excerpts the following portion of his defense counsel's cross-examination of McBirney:

> Q. And as a result of that, since then you have been doing everything you possibly can to get the sentence reduced, have you not?
>
> A. Since then I have been cooperating as did I before the sentence was handed down with the government, yes.
>
> Q. But you have taken legal steps in an effort to obtain a reduction in your sentence, have you not?
>
> A. Legal steps in what way?
>
> As far as what --
>
> Q. Well, have you or your lawyers on your behalf filed motions with the court requesting that the sentence be reduced after you were sentenced?
>
> A. No, not yet.
>
> Q. You have not filed a motion?
>
> A. Rule 35?
>
> Q. Yes.
>
> A. No.
>
> Q. When is the last time that you spoke with any of your attorneys concerning whether or not they have filed a rule 35 motion requesting a reduction of your sentence?
>
> A. Yesterday.
>
> Q. They're telling you that you have not filed such a motion?
>
> A. We have not filed a rule 35, no, sir.
>
> Q. Let me ask this pointedly, Mr. McBirney.
>
> If a hearing on your rule 35 motion wasn't set Tuesday of this week?
>
> A. I don't know if it was set Tuesday of this week, but I'm saying to you that we have not filed a rule 35.
>
> We filed extensions to -- we have continued to file extensions, but we have not filed a rule 35.
>
> Q. All right. Was a hearing set to be conducted on that, whatever it is you filed, on Tuesday of this week?
>
> A. No, sir.

*dial action was pending with respect to McBirney's fifteen-*year sentence, which "obviously went directly to McBirney's motive, interest and bias as a government witness."

A thorough review of all of the relevant testimony convinces us that Grosz's claim is meritless.[16] Immediately following the excerpt cited by Grosz, the following exchange occurred:

> Q. And I'll ask you one more time: Did those lawyers file the required motion within that 120-day period.
>
> A. You asked me if they filed a rule 35 or filed a motion to extend the deadline for the filing?
>
> I'm not trying to argue. I'm trying to understand what you're asking me for.
>
> If you ask me if they extended the deadline, that's correct.
>
> Q. That's your understanding of it?
>
> A. Yes.
>
> Q. Now, have the attorneys -- your attorneys told you when you might expect a hearing on the motion?
>
> A. No.
>
> Q. Concerning the motion to reduce your sentence, you understood in the plea agreement the government reserved the right to oppose that, did they not?

> Q. So tell me again what it is your understanding is that your lawyers have filed trying to get a lower sentence?
>
> A. Nothing yet.

[16] Grosz's assertion that a side deal existed with the government in exchange for his testimony is based on unfounded speculation and is thus similarly meritless.

A. That's correct.

Q. So they are holding that over you, so to speak, are they not?

A. We haven't really discussed it.

Q. You and your lawyers have not talked to the prosecution as to whether or not the U.S. Attorney's Office is going to oppose your request for a lower sentence?

A. We haven't discussed what they're going to say about any lower sentence. We have not discussed it with them.

* * *

Q. Now, you understand, do you not, under that plea agreement, Mr. McBirney, that it is the prosecution over here that is going to decide whether or not you have told the truth. The defense has got nothing to do with it.

You understand that?

A. Whether it's the defense or prosecution, I still have to tell the truth.

Q. I understand. But concerning your request for a lower sentence, you realize that it's the [prosecution] that's going to decide that?

A. To my understanding, that is correct.

The transcript shows that at best McBirney's denial was based on a technicality of seeking a sentence reduction. He was obviously confused about the specific legal steps taken by his lawyers to secure a lower sentence. The testimony nevertheless clearly indicates that some sort of effort at sentence reduction was in process and that McBirney was beholden to the government at the time he was testifying. Based on all of the relevant testimony we must reject Grosz's contention that the jury was

left with the impression that no remedial action was pending over which the government would have some influence.

V

Grosz's final claim is that his conspiracy conviction is barred by the Fifth Amendment's double jeopardy clause because it was part of a larger conspiracy for which he had been acquitted previously in Kansas. We have considered and denied Grosz's double jeopardy claim on interlocutory appeal in an unpublished opinion. *United States v. Grosz*, 977 F.2d 577 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1284, 122 L.Ed.2d 676 (1993).

"The 'law of the case' doctrine, a restriction self-imposed by the courts on themselves in the interests of judicial efficiency, generally operates to preclude a reexamination of issues decided on appeal either by the district court on remand or by the appellate court itself upon subsequent appeal." *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061 (5th Cir. 1981) (citation omitted). In the criminal context, the law of the case doctrine prohibits this court from reconsidering an earlier decision denying a double jeopardy claim raised during an interlocutory appeal. *United States v. Singleton*, 49 F.3d 129, 134 (5th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 324, 133 L.Ed.2d 225 (1995). An exception to this bar exists if the "evidence on a subsequent trial was substantially different." *Young v. Herring*, 938 F.2d 543, 547 (5th Cir. 1991) (citation omitted), *cert. denied*, 503 U.S. 940, 112 S.Ct. 1485, 117 L.Ed.2d 627 (1992). That is not the case here.

We thus conclude that the "law of the case" doctrine precludes reconsideration of our previous denial of Grosz's double jeopardy claim.

VI

For the foregoing reasons, we AFFIRM the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:91-CR-0390-T

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH GROSZ,

Defendant.

FILED MAR. 11, 1994

ORDER DENYING MOTION TO DISMISS INDICTMENT

Before the Court is Defendant's Motion to Dismiss Indictment Due to Violation of Speedy Trial Act. The government filed a response to the motion. After consideration, the Court denies the motion.

Defendant was indicted in this case on December 11, 1991, and arraigned on January 16, 1992. He filed his pretrial motions on January 27, 1992. The Court ruled upon most of these motions by May 13, 1992. However, the Court kept four motions under advisement.

Defendant appealed the Court's ruling on one of motions--his motion to dismiss the indictment based on double jeopardy. That appeal commenced on May 15, 1992, and was terminated on March 4, 1993. Defendant did not file any further motions until February 22, 1994, when he filed this motion to dismiss the indictment, claiming a violation of his Speedy Trial Act rights. Defendant's trial began on March 7, 1994.

Defendant contends that this indictment should be dismissed because the delay in the trial of this case violates the Speedy Trial Act. Specifically, he contends that the delay between the time his interlocutory appeal was terminated and the time he filed this motion violates the Act.

The Act requires that a criminal defendant be placed on trial within 70 days from the filing of the indictment or the defendant's initial court appearance, whichever occurs last. 18 U.S.C. § 3161(c)(1). However, any delay resulting from an interlocutory appeals is excluded in computing the period in which trial must commence. 18 U.S.C. § 3161(h)(1)(E). Likewise, any period of delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on the motion, or other prompt disposition, is excluded. 18 U.S.C. § 3161(h)(1)(F).

The 70 day period began to run on January 16, 1992, when Defendant was arraigned. Eleven non-excludable days elapsed before he filed his pretrial motions, at which time the clock was tolled, pending disposition of his motions. The Court kept four motions of these motions under advisement until March 2, 1994. Therefore, under § 3161(h)(1)(F), the period of time from January 27, 1992 to March 2, 1994, is excluded from the calculation of the time by which Defendant must be brought to trial.

Defendant contends that when a court takes under advisement a motion subject to prompt disposition, the period of time excludable due to this action is limited by § 3161(h)(1)(J). That section provides that "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the Court, is excludable." 18 U.S.C. § 3161(h)(1)(J).

Defendant argues that this language limits to 30 days the period of excludable time under § 3161(h)(1)(F), at least for motions that are subject to prompt disposition. He refers

the Court to a number of holdings in other circuits that support his reading of the statute. *See, e.g., United States v. Ramirez,* 973 F.2d 36, 37 (1st Cir. 1992); *United States v. Davenport,* 935 F.2d 1223, 1228 (11th Cir. 1991).

However, the Fifth Circuit has stated that delays resulting from pretrial motions toll the trial clock indefinitely; there is no requirement that the delay attributable to the motions be reasonable. *United States v. Kingston,* 875 F.2d 1091, 1109 (5th Cir. 1989). Therefore, the Court concludes that the period of time from January 27, 1992 to March 2, 1994, should be excluded in computing the time in which Defendant's trial must commence.[1]

Further, the period of time between the filing and disposition of the motion for leave to file this motion is also excludable. The motion for leave was filed on March 3, 1994; only one non-excludable day passed between the date the Court ruled on Defendant's remaining pre-trial motions and the date his trial began. A total of 12 non-excludable days passed between Defendant's arraignment and the commencement of his trial. This does not violate Defendant's right to a Speedy Trial.

The Court notes that the Fifth Circuit has indicated that an exception might be justified if a defendant repeatedly and unsuccessfully complains of pretrial delays. *See United States v. Walker*, 960 F.2d 409, 413 (5th Cir. 1992). However, the Court does not reach this issue because Defendant did not complain about any delay in deciding his pretrial motions.

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[1] Additionally, the period of time between May 15, 1992, and March 4, 1993, is excludable under § 3161(h)(1)((E), because it is delay resulting from an interlocutory appeal.

It is therefore **ORDERED** that Defendant's Motion to Dismiss Indictment Because of a Violation of the Speedy Trial Act, filed March 7, 1994, is denied.

Signed this // day of March 1994.

/s/
Robert B. Maloney
Presiding Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10922

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JOSEPH GROSZ,

Defendant - Appellant.

Appeal from the United States District Court for the
Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 2/22/96, 5 Cir., 1996, F.3d

(April 9, 1996)

Before REAVLEY, JOLLY and WIENER, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/
E. Grady Jolly
United States Circuit Judge

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 3161

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise

dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limita-

tions specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offence must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to---

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval

of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the

request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
>
> (iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which

the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of the paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly---

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CR3-91-390-T

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH GROSZ,

Defendant-Appellant.

FILED MAR. 3, 1994

MOTION TO DISMISS INDICTMENT BECAUSE OF A VIOLATION OF THE SPEEDY-TRIAL ACT AND INCORPORATED MEMORANDUM

Joseph Grosz, defendant, by his undersigned attorneys, moves pursuant to the federal Speedy Trial Act, 18 U.S.C. 3161 et seq. for the entry of an Order dismissing the captioned indictment, and in support thereof states.

(A) The Facts Of This Case Demonstrate A Flagrant Violation Of The Speedy Trial Act.

(1) Mr. Grosz was indicted on December 11, 1991 and arraigned on January 16, 1992. As of the date of the filing of this Motion he has not been brought to trial. At least one year of the delay in bringing this cause to trial is not excludable or otherwise attributable to Mr. Grosz.

(2) At the arraignment, the Court ordered that defense pretrial motions be filed by January 27, 1992, government responses by February 3, 1992; a pretrial conference

(ruling date) was set for February 27, 1992, and trial was scheduled for March 2, 1992.

(3) On February 6, 1992, the case was reset to June 1, 1992, and a pretrial conference was scheduled on May 28, 1992. On March 13, 1992, at defendant's request, the pretrial conference was reset to May 7, 1992, so as to allow defendant adequate time to prepare for trial, after ruling on motions.

(4) Between May 7, and May 13, 1992, the Court issued rulings on most of the seventeen pretrial motions that had been filed by the defense. Notably, the court denied defendant's double jeopardy motion, and defendant promptly took an appeal from this ruling. (The Docket sheet is attached hereto as Exhibit #1)

(5) The Court's Order of May 11, 1992, did take four of the defense motions under advisement (See Exhibit #2). No evidentiary hearings, however, were ever set with respect to any defense motion. As of the date of the filing of this motion, two of defendant's pretrial motions have not yet been ruled upon.

(6) Defendant's interlocutory double jeopardy appeal commenced on May 15, 1992, and was ultimately resolved adversely to defendant on February 22, 1993, upon denial of defendant's Petition For Certiorari in the Supreme Court. (See Exhibit #3) On March 4, 1993, the clerk of the District Court received notice from the Fifth Circuit Court of Appeals that the appeal was over and "no further order will be forthcoming."

(7) For purposes of pursuing his appeal, Mr. Grosz on May 18, 1992 moved to continue the trial of this cause "pending appellate review" of the double jeopardy claim. The motion specifically excluded only that time necessary to pursue the appeal. (See Exhibit #4)

(8) Under Title 18 U.S.C. 3161 (C)(1) a defendant must be placed on trial within 70 days from the filing of the indictment or defendant's initial court appearance, whichever

occurs last. However, the proceedings involving defendant's interlocutory appeal exclude that time period from the 70 day rule. (Title 18 U.S.C. 3161 (h)(1)(E)).

(9) Defendant's pretrial motions also excluded any delay resulting from the filing of the motions until their "prompt disposition." Section 3161 (h)(1)(F).

(10) As to motions "taken under advisement" excludable delay is *limited* to "any period, not to exceed thirty days, ..." Section 3161 (h)(1)(J) See *Henderson vs. United States*, 476 U.S. 321, 329 (1986).

(11) Section 3162 (a)(2) provides that the Court "shall" dismiss the indictment if the defendant is not brought to trial within 70 non-excludable days, and whether the dismissal is with or without prejudice is dependent upon, among other things, the circumstances surrounding the dismissal.

(12) From the termination of defendant's appeal to February 22, 1994, defendant has filed no additional motions, nor done any act to delay the trial of this cause.

(13) The relevant statutory provisions do not require that the defendant formally demand trial; the Speedy Trial Act is a right to which defendant is entitled as a matter of law. See *United States vs. Rivera*, 427 F.Supp. 89, 91 (S.D.N.Y. 1977).

(14) This cause is currently set on the Court's jury docket for March 7, 1994. The delay of about one year in bringing this case to trial is non-excludable, and, therefore, the indictment must be dismissed.

(B) Discussion and Citation of Authorities

For purposes of the Speedy Trial Act (Act), the issue raised here revolves around the period from the conclusion of

defendant's appeal on March 4, 1993, to February 22, 1994[1]. and whether defendant's motions which were taken "under advisement" on May 11, 1992, operate to exclude any time under the Act, from March 4, 1993 to the Court's rulings on March 2, 1994.

On May 11, 1992, the Court took "under advisement" defendant's motions to: (1) determine admissibility of co-conspirator statements; (2) grant early release of jury information; (3) exclude evidence of financial conditions or events, and (4) exclude evidence of civil regulatory violations. These motions were fully briefed by the parties and no hearings, evidentiary or otherwise, have ever been scheduled with respect to these matters. Indeed, to date all of the pretrial motions filed in this cause have been decided on the papers. Thus, rulings were all that remained on defendant's pretrial motions, as of May 11, 1992.[2] (See Exhibit #5)

We submit that the extraordinary delay in this cause from March 4, 1993 to the present is not excludable under the Act, based upon the clear language of the Act as well as its legislative history, and the definitive judgment of the United States Supreme Court.

The applicable statute limits excludable delay to not more than 30 days "during which any proceeding concerning the defendant is actually *under advisement* by the court" Section 3161(h)(1)J) (Emphasis supplied). There can be no doubt that this statute means what it says. In *Henderson vs. United States*, 476 U.S. 321, 329 (1986), the Court further delineated the rule that applies to motions taken "under advisement":

"Subsection (F), written in the disjunctive, excludes time in two situations. The first arises when a pretrial motion

---

[1] The filing of defendant's motion to dismiss the indictment on February 22, 1994 tolled the Speedy Trial Act. Section 3161 (h) (1)(f).

[2] The term "under advisement" refers to the consideration by the court of a matter at the conclusion of the pleadings, evidence, and argument. See, *In Re Hohorst*, 150 U.S. 653.

requires a hearing: subsection (F) on its face excludes the entire period between the filing of the motion and the conclusion of the hearing. The second situation concerns motions that require no hearing and that result in a 'prompt disposition.' There, the promptness requirement was 'intended to provide a point at which time will cease to be excluded, where motions are decided on the papers filed without hearing.' S.Rep.No. 96-212, at 34. The 'point at which time will cease to be excluded' is identified by subsection (J), which permits an exclusion of 30 days from the time a motion is actually 'under advisement' by the court. Without the promptness requirement in subsection (F), a court could exclude time beyond subsection (J)'s 30-day 'under advisement' provision simply by designating the additional period as time 'from the filing of the motion' though its 'disposition' under subsection (F). As the Senate Committee on the Judiciary explained:

> 'In using the words 'prompt disposition', the committee intends to make it clear that, in excluding time between filing and disposition on the papers, the Committee does not intend to permit circumvention of the 30 days, 'under advisement' provision contained in Subsection (h)(1)(J). Indeed, if motions are so simple or routine that they do not require a hearing, necessary advisement time should be considerably less than 30 days.' *Ibid.*"

Fifth Circuit decisions lack clarity as to the distinction between subsection (F) motions that require a hearing and can be postponed indefinitely,[3] *United States* vs. *Walker*, 960 F.2d 409, 412 (5th Cir. 1992); *United States* vs. *Martinez-Mercado*, 888 F.2d 1484, 1493 (5th Cir. 1989), and subsection (J) motions which are taken "under advisement" and must

[3] Other Circuits hold that motions that require hearings must be resolved with reasonable promptness. *United States* vs. *Tedeschi*, 774 F2d 511, 512 (1st Cir. 1985); *United States* vs. *Tibboel*, 753 F2d 608, 612 (7th Cir. 1985).

be ruled upon within 30 days, *United States* vs. *Santoyo*, 890 F.2d 726, 727 (5th Cir. 1989); *United States* vs. *Horton*, 705 F.2d 1414, 1416 (5th Cir. 1983).

The overwhelming majority of Circuits have held that the subsection (J) 30 day rule applies to motions that do not require a hearing. See, e.g., *United States* vs. *Ramirez*, 973 F.2d 36, 37 (1st Cir. 1992); *United States* vs. *Davenport*, 935 F.2d 1223, 1228 (11th Cir. 1991); *United States* vs. *Felton*, 811 F2d 190, 197 (3rd Cir. 1987); *United States* vs. *Pelfrey*, 822 F.2d 628, 633-634 (6th Cir. 1987); *United States* vs. *Wilson*, 835 F.2d 1440, 1442 (D.C. Cir. 1987); *United States* vs. *Hines*, 728 F.2d 421, 426 (10th Cir. 1994); *United States* vs. *Bufalino*, 683 F.2d 639, 642 (2d Cir. 1983); *United States* vs. *Janik*, 723 F.2d 537, 543 (7th Cir. 1983).

Indeed any other result could operate to indefinitely postpone a trial merely because a defendant files a routine, boilerplate motion. This, most assuredly, was not the intent of Congress in enacting the Speedy Trial Act.

It has also been noted that a defendant is not required to demand a trial to be entitled to the benefits of the Act. The courts and prosecutors assume primary responsibility for ensuring that criminal trials proceed expeditiously. *United States* vs. *McAfee*, 780 F.2d 143, 146 (1st Cir. 1985); *United States* vs. *Pollock*, 726 F.2d 1456, 1464 (9th Cir. 1984). It is doubtful that a defendant can even waive the protections afforded by the Act. *United States* vs. *Kington*, 875 F2d 1091, 1107 (5th Cir. 1989). Further, neither crowded dockets *United States* vs. *Andrews*, 790 F.2d 803, 808 (10th Cir. 1986), nor administrative snafus can exclude time under the act. (*United States* vs. *Ramirez*, 973 F.2d 36, 37 (1st Cir. 1992).

(C) Conclusion

Permissible excludable delay in this cause terminated no later than March 4, 1993. Close to two years have elapsed while the court has taken non-hearing defense motions under

advisement. Mr. Grosz is not required to demand a prompt trial; the Act is self-executing. Because the excessive delay in this cause is clearly non-excludable under the Act, the captioned indictment ought to be dismissed.

WHEREFORE, defendant prays for the entry of an Order dismissing the captioned indictment, and further, for a hearing, to establish that the dismissal ought to be with prejudice pursuant to 18 U.S.C. 3162 (a)(2).

Respectfully submitted,

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Attorney for Defendant
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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Criminal No. 3:91-CR-390-T

THE UNITED STATES OF AMERICA,

v.

JOSEPH GROSZ

FILED MAR. 4, 1994

OPPOSITION OF THE UNITED STATES TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT UNDER THE SPEEDY TRIAL ACT.

NOW COMES the United States of America, by and through undersigned counsel, and files this Opposition to Defendant's Motion to Dismiss the Indictment Under the Speedy Trial Act, 18 U.S.C., 18 U.S.C. § 3161.

In support of its Opposition, the Government would respectfully show the Court the following.

THERE HAS BEEN NO VIOLATION OF THE SPEEDY TRIAL ACT BECAUSE DELAYS FOR PRETRIAL MOTIONS ARE SPECIFICALLY EXCLUDED BY 18 U.S.C. § 3161(h)(1)(F)

By its own terms, 18 U.S.C. § 3161(h)(1) provides that "[a]ny period of delay resulting from . . . (F) . . . any pre-trial motion" is excluded in computing the period in which trial must commence.

The law of the Fifth Circuit is clear that under § 3161(h)(1)(F) "[d]elays resulting from pre-trial motions ' " 'will toll the trial clock indefinitely; there is no independ-

ent requirement that he delay attributable to the motions be reasonable.' " ' *United States v. Santoyo*, 890 F.2d 726, 728 (5th Cir. 1989), *cert. denied*, 495 U.S. 959 (quoting *United States v. Kington*, 875 F.2d 1091, 1109 (5th Cir. 1989) (citations omitted))." *United States v. Walker*, 960 F.2d 409, 414 (5th Cir. 1992. The *Walker* court specifically noted that a defendant's failure to complain to the district court about the delay in deciding a defense pretrial motion is a strong indication that the defendant. *Walker*, 960 F.2d at 413. There is no indication that defendant Grosz has made any effort between March 4, 1993 and the filing of the present motion to complain of the Court's delay in deciding his pretrial motions.

CONCLUSION

For the foregoing reasons, the Government concludes that the period in question--March 4, 1993 through February 22, 1994--should be excluded under 18 U.S.C. §3161(h)(A)(F).

The Government respectfully asks the Court to deny the defendant's Motion.

Dated: March 4, 1994

Respectfully submitted,

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/s/
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS

No. CR3-91-390-T

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH GROSZ,

Defendant.

FILED JAN. 27, 1992

DEFENDANT JOSEPH GROSZ'S MOTION AND MEMORANDUM IN LIMINE TO EXCLUDE EVIDENCE OF SUBSEQUENT FINANCIAL CONDITIONS OR EVENTS

COMES NOW, Joseph Grosz, Defendant herein, who, through undersigned counsel, moves the Court for an Order prohibiting introduction by the Government of evidence relating to the financial condition of Peoples Heritage Savings and Loan Association ("Peoples"), San Jacinto Savings Association (San Jacinto Savings) , South Mark Corporation, and evidence of events concerning the 61 Acre Bedford property, 43 Acre Plano property and the 749.12 Acre Flower Mound property that occurred after the last overt act alleged in the Indictment.

Evidence of the financial condition of Peoples, San Jacinto Savings or Southmark Corp. subsequent to the period at issue here would be irrelevant and highly prejudicial. Subsequent events concerning the above stated properties should also be excluded. Although the value of the properties during the period of the conspiracy may be relevant, developments occurring after this period and any ultimate gain or loss as of

the present are not relevant to the charged offenses, and would be highly prejudicial.

Except to inflame the jury, any losses (subsequent to the dates in the indictment) sustained by the lending institutions in the case, or depreciated values of the properties involved would serve no purpose at trial. Indeed, evidence of financial loss is irrelevant. See *United States* v. *Lemons*, 941 F.2d 309, 316 N.3 (5th Cir. 1991), and cases cited therein.

Application of the balancing test mandated by Rule 403 of the Federal Rules of Evidence, i.e., probative value versus the danger of unfair prejudice, calls for the exclusion of any evidence of subsequent financial loss. It is well settled that "a scheme to defraud is not necessarily to be inferred from business adversity or unprofitable ventures." *Scott* v. *United States*, 263 F.2d 398, 401 N.2 (5th Cir. 1959)

Moreover, the lack of relevance of this evidence is magnified herein, for the Savings and Loan crises in this Country has generated so much media attention. It would be patently unfair to impale Mr. Grosz upon the petard of such a highly charged public issue. Hindsight is an unappropriate barometer in bank fraud cases. In *Untied States* v. *Payne*, 750 F.2d 844, 857 (11th Cir. 1985) the court stated:

> The government's argument that the borrowers were not credit-worthy seems to be based primarily on the *post hoc* observation that the borrowers eventually ended up in default. However, the use of hindsight is inappropriate in determining whether or not the making of a loan constitutes misapplication of bank funds.

The wisdom of this rule is especially clear in this context, as the volatile economic conditions prevalent in these areas in the relevant period provide credible alternative explanations for the losses in question.

Based on the above authorities, the Court should bar the Government from introducing any evidence of losses or

devaluations connected to the lending institutions or properties in this case, and any evidence of events occurring after the transactions which relate to the value of the properties. Such evidence would have no bearing on the allegations in the Indictment, and could only prejudice the jury against Defendant Grosz.

WHEREFORE, defendant Grosz prays for the entry of an Order barring the prosecution from introducing evidence as argument regarding subsequent financial losses allegedly suffered by the lending institutions enumerated in the indictment.

Respectfully submitted

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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. CR 3-91-390-T

UNITED STATES OF AMERICA

V.

JOSEPH GROSZ (1)

FILED FEB. 3, 1992

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF SUBSEQUENT FINANCIAL CONDITIONS OR EVENTS

The United States for its response to Defendant's Motion in Limine to Exclude Evidence of Subsequent Financial Conditions or Events would respectfully show the Court as follows:

I.

Defendant urges that all evidence of the financial condition of Peoples Heritage Federal Savings and Loan Association ("Peoples Heritage"), San Jacinto Savings Association ("San Jacinto"), Southmark Corporation and the particular properties specified in the indictment be excluded as being either irrelevant or highly prejudicial. Defendant's requested bar would apply only to evidence of financial condition post dating the last overt act charged in the indictment, i.e. December 1987.

II.

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as "evidence having a tendancy to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." There are two requirements in the rule: (1) the evidence must tend to prove the matter sought to be proved and (2) the matter sought to be proved must be one that is of consequence to the determination of the action. *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981).

The government will seek to prove that the real properties involved in the land flips alleged were substantially overvalued for the propose of increasing the amount of money which could be loaned against them and that the defendant knew this at the time he caused San Jacinto to make the loans to McClain. This fact is of consequence to the execution of the bank fraud, wire fraud and willful misapplication charges of the indictment. Of equal importance is the true market value of these properties, one measure of which is the value assigned by knowledgeable, independent witnesses not in league with the defendant or his co-conspirators. Further, while the government need not show actual loss by a bank to prove a bank fraud scheme, it is necessary to show that a financial institution was placed at risk. *United States v. Lemons*, 941 F.2d 309, 315-16 (5th Cir. 1991). The government asserts it is highly relevant to quantify the degree of risk in such bank fraud schemes and an appropriate measuring stick is the value of such properties free from the influence of the scheme perpetrators which can only happen after they are no longer connected with the institution.

Rule 403 of the Federal Rules of Evidence provides that relevant evidence may be inadmissible if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues or misleading the jury. Relevant evidence unfavorable to a defendant is always prejudicial to his interests. The issue is always whether such prejudice is *undue*.

From the government's perspective Mr. Grosz has already hoisted himself on his own petard and the government will not seek to make him a scapegoat for the entire S&L crisis. However, the effect which defendant's alleged criminal activities had on San Jacinto and on Peoples Heritage is relevant to the issues in this case and the government must not be excluded from presenting all relevant evidence. The defense is free to offer what ever evidence it has in mitigation or by way of explanation of other reasons or factors contributing to the failure of the institutions in question. However, the fact of such failures and defendant's role in them is relevant and must not be excluded from the jury's consideration.

The Defendant's motion to exclude evidence of subsequent financial conditions or events should be denied in its entirety.

Respectfully submitted

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS

No. CR 3-91-390-T

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH GROSZ,

Defendant.

FILED FEB. 25, 1992

DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF SUBSEQUENT FINANCIAL CONDITIONS OR EVENTS

The prosecution has perhaps misconstrued the issue raised. We expect the prosecution to seek to prove that the properties involved here "were substantially overvalued. . ." However, the defense objects to any attempt to prove such overvaluation by *subsequent events*.

The true market value of the properties is relevant only when the loans were made. Since the market value of property is necessarily a prognostication, especially when dealing with undeveloped land, the fraud charges in this case should not turn upon subsequent economic (or political) events that adversely affected the value of the property.

If the government's proof is limited to the true market value of the properties as of the dates of the transactions, we do not object to admissibility; but this issue cannot and should not be proved by events occurring years later. Similarly, that subsequent events rendered a given loan unsound and therefore adversely affected the lending institution is not pertinent to the issues in this case.

A lender presumably is always at some risk[1] when any loan is made, but Courts generally frown upon attempts to prove *misconduct* by subsequent events. Compare Rule 407, Federal Rules of Evidence. This rationale would seem to be especially appropriate here where so many diverse and unforeseeable factors can intrude upon the value of real estate. Mr. Grosz's jury should not be permitted to draw any inference of guilt because of a subsequent decline in the value of this land.

It may be that the prosecution and defense agree upon this point. Nevertheless, we move for an Order barring evidence of subsequent events to prove financial losses or risks to an institution, for such a *nunc pro tunc* analysis is clearly irrelevant.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

[1] Unlike the government, we do not read the *Lemons* case as equating the risk associated with an otherwise proper loan with a bank fraud scheme. *United States* v. *Lemons*, 941 F.2d 309, 315-316 (5th Cir. 1991).

App. 54

[Pages 2, 5]

TRANSCRIPT OF PRETRIAL HEARING
BEFORE THE HONORABLE
ROBERT B. MALONEY
UNITED STATES DISTRICT JUDGE

May 7, 1992

THE COURT: Good morning.

MR. SAMUELS: Good morning.

MR. BLAIR: Good morning.

THE COURT: The court has entered an order on the motion to dismiss based upon double jeopardy denying the motion and entering an order on motion to dismiss based upon multiplicity, denying the motion.

Let me ask the defense, do they intend to pursue an interlocutory appeal on the double jeopardy question?

MR. SAMUELS: Yes, Your Honor, my client has instructed us to proceed with an appeal.

THE COURT: What I'm going to do then is I will rule on the remaining pretrial motions that I feel need to be done, and if it's necessary -- if when we hear from the Fifth Circuit, if it should be that the Fifth Circuit affirms the trial court, then we'll have another pretrial.

But I'll just go over -- because I'm going to keep some of the motions under advisement while I decide some of them today.

* * *

[THE COURT:] Then I will have another pretrial conference, because we're going to need to set the case for trial at that time. And the government will need to be prepared to

disclose such evidence to the defendant at or soon after that pretrial conference.

The government, the court is going to hold and keep under advisement defendant's motion to determine the admissibility of extra judicial statements of alleged co-conspirators.

The motion to exclude evidence of subsequent financial condition for events and the motion to exclude evidence of civil regulatory violations, the court will be prepared to rule on such motions at the next pretrial conference, if such is necessary.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CR 3-91-0390-T

UNITED STATES OF AMERICA,

v.

JOSEPH GROSZ

FILED MAY 13, 1992

ORDER ON PENDING MOTIONS

On May 7, 1992, a pretrial conference was held in this matter. At the hearing, the court ruled on the parties' pending motions. This order memorializes those rulings.

It is **ORDERED** that Defendant's January 27, 1992 Motion for Discovery is granted.

It is further **ORDERED** that Defendant's January 27, 1992 Motion for Production of Witness Statements is granted to the extent that a witness' statement would constitute Jencks' Act material. Such statements shall be provided by the government at least one business day before the witness actually testifies. The motion is denied in all other respects except to the extent that such material would constitute *Brady* material and would be exculpatory for Defendant.

It is further **ORDERED** that Defendant's January 27, 1992 Motion to Disclose Plea Bargains, Deals and Grants of Immunity is granted to the extent that the government shall disclose any such agreements made with witnesses who will testify during the trial of this action. The government shall also reveal any threats which have been made with respect to any such testifying witness.

It is further **ORDERED** that Defendant's January 27, 1992 Motion for Disclosure of Wiretapping, Eavesdropping, Electronic Surveillance or Mail Surveillance is granted to the extent that should any recordings or electronic surveillance come to its attention, the government shall immediately make such facts known to Defendant.

It is further **ORDERED** that Defendant's January 27, 1992 Motion to Require Law Enforcement Officers to Retain Copies of Handwritten Notes is granted to the extent that such notes that are currently in existence shall be preserved by the officer making such notes and shall be made available to the court upon request for the purpose of reviewing them *in camera.*

It is further **ORDERED** that Defendant's January 27, 1992 Motion for Leave to File Additional Motions is denied without prejudice to Defendant filing a motion for leave to file a particular motion and showing adequate cause why the motion was not filed in a timely manner.

It is further **ORDERED** that Defendant's January 27, 1992 Motion for Pretrial Disclosure of all Evidence which the Government Intends to Offer Pursuant to Fed. R. Evid. 404(b) is granted to the extent that the government intends to use any 404(b) material in its case in chief. As to any other 404(b) evidence which may become admissible during trial, the government shall first approach the bench and obtain a ruling from the court outside the presence of the jury before offering such evidence to the jury. The government shall be prepared to disclose such evidence to Defendant at or soon after the next pretrial conference held in this matter.

It is furthered **ORDERED** that the government's January 27, 1992 Motion for Reciprocal Discovery and Notice of Alibi and Insanity Defense is granted.

It is further **ORDERED** that Defendant's February 25, 1992 Motion for Leave to File Replies is granted.

It is further **ORDERED** that the following motions are taken under advisement: 1) Defendant's January 27, 1992 Motion to Determine Admissibility of Extra-Judicial Statements of Alleged Co-Conspirators and to Establish Order of Proof as to Conspiracy Allegation, 2) Defendant's January 27, 1992 Motion for Early Release of Jury Information, 3) Defendant's January 27, 1992 Motion to Exclude Evidence of Financial Conditions or Events, and 4) Defendant's January 27, 1992 Motion to Exclude Evidence of Civil Regulatory Violations.

Signed this 11th day of May 1992.

/s/
Robert B. Maloney
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:91-CR-0390-T

UNITED STATES OF AMERICA,

v.

JOSEPH GROSZ (01),

Defendant.

FILED FEB. 24, 1994

ORDER RESETTING PRETRIAL CONFERENCE

The pretrial conference in this case is rescheduled for **March 3, 1994, at 9:30 AM.**

The conference will be held in the courtroom, Room 15B36, U.S. Courthouse, 1100 Commerce Street, Dallas, Texas.

It is so **ORDERED.**

Signed: February 24, 1994.

/s/
Robert B. Maloney
Presiding Judge

App. 60

[Pages 2-3]

TRANSCRIPT OF PRETRIAL HEARING

March 3, 1994

THE COURT: 91-390, United States versus Grosz. It appears we have two motions currently pending. One of them is the defendant's motion in limine to exclude evidence of subsequent financial conditions, and then defendant's motion to dismiss the indictment based on preindictment delay.

All right. Does the government oppose the defendant's motion in limine?

MR. FRANK: Yes, sir.

THE COURT: On what basis?

MR. FRANK: We believe that the evidence of loss occasioned by the transactions in which this defendant participated in shows evidence of intent and also a pattern of dealings with these institutions. And the jury should be able to consider this evidence to fully appreciate the extent of the defendant's conduct in this particular series of transactions which resulted in substantial losses for two different financial institutions.

THE COURT: Would your agreement be the same if the properties had sold at a profit?

MR. FRANK: I believe the jury should be entitled to understand exactly what did happen to the properties as to whether they were profitable or sold at a loss.

It's important to know how this defendant's activities and arrangements for these loans and approving these loans played into the overall financial structure of the institutions and what ultimately happened to these entities.

THE COURT: I'm going to grant the motion in limine. The government shall not refer to any losses on the prop-

erties in the presence of the jury without first approaching the court and obtaining a ruling from the court if you intend to offer such evidence.

All right. Defendant's motion to dismiss the indictment.

Is that motion going to require a hearing?

MR. SAMUELS: Good morning, Your Honor, Elliott Samuels on behalf of Mr. Grosz.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:91-CR-0390-T

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH GROSZ,

Defendant.

FILED MAR. 9, 1994

ORDER GRANTING MOTION IN LIMINE

Before the Court is Defendant's Motion in Limine. The government filed a response to the motion. Defendant seeks to exclude evidence relating to the financial condition of two financial institutions and events concerning certain properties. The evidence at issue concerns events and conditions subsequent to the last overt act alleged in the indictment.

The Court heard arguments on the motion at a pre-trial conference on March 3, 1994. After consideration, the Court grants the motion. The government shall not refer to or introduce evidence of any losses or devaluations on the properties and institutions in this case in the presence of the jury without first approaching the bench and obtaining a ruling on the admissability of such evidence.

It is therefore ORDERED that Defendant Joseph Grosz's Motion and Memorandum in Limine to Exclude Evidence of Subsequent Financial Conditions or Events, filed January 27, 1992 is granted.

Signed this 8 day of March 1994.

/s/
Robert B. Maloney
Presiding Judge